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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1231

CITY OF CLEVELAND,
Petitioner,
v.
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
and SQUIRE, SANDERS & DEMPSEY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

JACK MITCHEL SCHULMAN
Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114

JAMES VANR. SPRINGER
ARTHUR J. GALLIGAN
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037

Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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Respondent concedes that there is a conflict among the circuits on the fundamental question whether an attorney may avoid disqualification by contending that the information he received in his former representation of a present adversary was not *confidential* information (Opp. p. 8). It tries, however, to persuade the Court that this conflict "will not be reached here" (*ibid.*) because there were allegedly other "independent factual bases" for the refusal to disqualify below (Opp. p. 7). This effort to transmute the grounds for the decision into findings of

fact and to avoid the conflicting determinations of law upon which it rests is specious.

The purportedly "factual" issues are those of waiver/estoppel and of "substantial relationship" between the present antitrust litigation and the subject matter of the respondent law firm's prior service as counsel for petitioner. Respondent does not, however, identify any subsidiary question of fact relevant to these issues that is in dispute; indeed, we do not even substantially disagree here with the highly colored statement of facts in the brief in opposition.[1] Thus, the validity of respondent's argument depends upon the premise that determinations of "substantial relationship" and of waiver or estoppel are themselves "factual" rather than legal in nature. Obviously they are the latter, and the "two court" rule is inapplicable here.

Contrary to respondent's argument, other courts of appeals have expressly held that it is a "purely legal question * * * whether two allegedly adverse representations are so intertwined that it can be said that in the former representation the attorney 'might have acquired' material 'substantially related' to the subject matter of the second representation." *American Roller Co.* v. *Budinger*, 513 F.2d 982, 985 n.3 (3 Cir. 1975); *Woods* v. *Covington County Bank*, 537 F.2d 804, 810 (5 Cir. 1976). As the petition shows, the court below decided this purely

[1] Our only disagreement is with respondent's conclusory assertion that the law firm "made no inquiry into MELP's debt structure or its financial condition" while serving as the City's bond counsel (Opp. p. 5). That assertion is unsupported by the findings below and is in fact inconsistent with them. The district court found that the information provided to bond counsel includes "an analysis of the * * * debt structure; various financial factors; governmental operations and economic characteristics of the issuing entity" which is "presented to bond counsel for examination as to accuracy, authenticity and legality" (App. 13a-14a; see Pet. pp. 4-5). Such information is obviously highly relevant to the present antitrust litigation.

legal question in a manner that conflicts with the decisions of other courts of appeals (Pet. pp. 13-15).

Whether an undisputed fact situation amounts to a waiver or estoppel—or whether these ethical rights can be waived at all *in futuro*—is no less purely legal, as is evidenced by this Court's decisions on identical questions in other contexts. See, *e.g.*, cases cited at Pet. p. 16. The holdings below on these interconnected issues[2] amount to an assertion of the proposition that anyone who engages this law firm is chargeable with knowledge of its representation of CEI and hence cannot object to CEI's use of any information reposed in the law firm. That proposition rests upon a conclusion of law that not only conflicts with the decisions cited at Pet. p. 16 n. 15, but also is patently wrong.

[2] Respondent's characterization of waiver and estoppel as separate issues is unwarranted. The district court relied on exactly the same subsidary facts as to each and there is no significant difference in its analyses (App. 23a-27). The court of appeals did not even differentiate between the two in its discussion of the point (App. 3a-4a). The single question is whether the undisputed circumstances of the City's engagement of the law firm in 1972 deprived the City of the ethical right it would normally have to prevent the law firm from using information obtained as the City's counsel on behalf of the City's adversary in a subsequently arising controversy.

CONCLUSION

For the foregoing reasons and those stated in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

JACK MITCHEL SCHULMAN
Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114

JAMES VANR. SPRINGER
ARTHUR J. GALLIGAN
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037

Attorneys for Petitioner

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